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FEDERAL REGULATION OF ISOLATED WETLANDS: TO BE OR NOT TO BE?

I. INTRODUCTION

Federal wetlands regulations under section 404 of the Clean Water Act (CWA) may be "the most controversial issue in environmental law."¹ These regulations pit the Nation's "most biologically-productive and most rapidly-diminishing ecosystems against [America's deeply valued] rights of private ownership and property development in more than 10,000 individual permit decisions a year."² As a result of this inherent tension, isolated wetlands regulations have been the center of substantial litigation and controversy in the environmental field.³

The controversy has centered on the federal regulation of isolated wetlands that sometimes prevents individuals from carrying out economically advantageous activities on their own private land.⁴ Opponents of federal regulation essentially argue that federal supervision of isolated wetlands located within a state's boundaries goes beyond the scope of the Commerce Clause due to the absence

1. Oliver A. Houck & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act section 404 and Related Programs to the States*, 54 MD. L. REV. 1242, 1243 (1995). CWA § 404 is the center of federal wetlands regulations controversy because its intended scope and application have been in dispute as far back as 1972. *See id.* The basis of CWA jurisdiction is that a federal program is required to protect, restore and maintain clean water and wetlands. *See id.*; *see also* Elaine Bueschen, *Do Isolated Wetlands Substantially Affect Interstate Commerce?*, 46 AM. U.L. REV. 931 (1997). The focus of the controversy has specifically been on isolated wetlands because they lack a connection to a navigable body of water. *See id.* at 933. The center of the controversy is whether isolated wetlands regulation can be based primarily on the use or potential use of isolated wetlands as a habitat by migratory birds. *See id.*; *see also* Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 ENVTL. L. 1, 4 (1999) (noting that this area initiated both considerable litigation and political controversy).

2. Houck & Rolland, *supra* note 1, at 1243 n.1 (stating § 404 operates through negotiating environmentally protective permitting conditions that decrease wetland loss).

3. *See* Bueschen, *supra* note 1, at 932-33 (noting on-going litigation concerning federal regulation of isolated wetlands); *see also* Adler, *supra* note 1, at 4 (recognizing isolated wetlands regulation has been center of substantial litigation and political controversies).

4. *See* Adler, *supra* note 1, at 4 (stating federal wetlands regulation under § 404 of the Federal Clean Water Act [hereinafter CWA] has been one of most debated areas of environmental policy in recent years). Many of the activities Corps attempts to regulate are non-commercial and involve such activities as planting a garden or building an extension onto one's home. *See id.* at 34.

of a sufficient nexus between isolated wetlands and interstate commerce.⁵ In contrast, proponents of federal regulation of isolated wetlands look beyond the fact that isolated wetlands lack a surface connection to any navigable body of water and place more emphasis on the ecological functions of these wetlands in order to establish a connection to interstate commerce.⁶

The underpinnings of isolated wetlands' regulatory protection are primarily based on the use or potential use of the wetlands as a habitat for migratory birds.⁷ Generally, courts have held this rationale to be within Congress' Commerce Clause power.⁸ However, a recent Supreme Court decision, *Solid Waste Agency of North Cook County v. United States Army Corps of Engineers* (SWANCC)⁹, held that extending the definition of "navigable waters" under CWA to include intrastate waters used as a habitat for migratory birds exceeds the authority granted to the United States Army Corps of Engineers (Corps) under CWA.¹⁰ Consequently, SWANCC effectively narrowed the scope of Corps' jurisdiction over these waters by limiting its authority over isolated wetlands.

Drawing the line between what constitutes "water" as opposed to "land" is a difficult task.¹¹ Swamps, marshes, bogs, and other areas, though not totally aquatic, are far from dry and lie in between

5. See Bueschen, *supra* note 1, at 933. Opponents base their arguments against federal regulation of isolated wetlands on the fact that these waters are not connected, on the surface, to a navigable body of water. See *id.*

6. See *id.* (noting different views of isolated wetlands between those who support federal regulation of isolated wetlands and those who oppose such regulation).

7. See *id.* This rationale is called the Migratory Bird Rule. See *id.* at 933 n.12. For a further discussion of the migratory bird rule, see *infra* notes 58-75 and accompanying text.

8. See Bueschen, *supra* note 1, at 933-34. The House of Representatives Bill 961, however, if passed, would have prohibited isolated wetlands' protection based upon migratory birds' actual or potential use of the area as a habitat. See *id.* If the Senate had passed House Bill 961, both the United States Corps of Engineers [hereinafter Corps] and the Environmental Protection Agency [hereinafter EPA] may have lost their jurisdiction over isolated wetlands where courts failed to recognize other functions of these waters linking them to interstate commerce. See *id.*

9. 531 U.S. 159 (2001).

10. See *id.* at 174. In this case, a consortium of municipalities sued Corps, objecting to Corps' exercise of jurisdiction over an abandoned sand and gravel pit where it planned to develop a site for non-hazardous solid waste. See *id.* at 159. The consortium also objected to the denial of a CWA permit to build this site. See *id.* For a further discussion of SWANCC and the Court's reasoning, see *infra* notes 129-140 and accompanying text.

11. See Craig N. Johnston, 1999-The Year in Review, 30 ENVTL. L. REP. 10173, 10179 (March 2000) (stating Corps must draw that line between water and land in order to determine limitations on its power to regulate discharges of fill or dredged material under CWA).

bodies of open water and dry land.¹² Therefore, in these areas it is difficult to distinguish between land and water.¹³

Isolated wetlands have no connection to other waters and are thus considered intrastate.¹⁴ Consequently, Corps needs some other link with interstate commerce to assert jurisdiction over the wetlands under the Commerce Clause.¹⁵ As part of its regulations, Corps established seven standards to assist it in determining whether a particular connection to interstate commerce warranted the exercise of its jurisdiction.¹⁶ One of those standards, the so-called migratory bird rule, allows Corps to assert jurisdiction over waters that are or could be used as a habitat by migratory birds.¹⁷

Until recently, there was considerable controversy in various courts of appeals about the scope of the migratory bird rule. An earlier Supreme Court decision discussing the rule seemed to interpret it broadly, extending Corps' powers.¹⁸ The Supreme Court's recent decision in *SWANCC*, however, held that the rule lacks support in CWA's text.¹⁹ Thus, Corps overstepped its statutory authority.²⁰ Consequently, this decision will have a significant impact on wetlands preservation and will spark environmental problems affecting the Nation's waters.

This Comment discusses the issue of whether the presence of migratory birds on isolated wetlands provides a sufficient nexus to

12. *See id.* (demonstrating difficulties of determining what is water and what is land).

13. *See id.* (stating that recognizing limits of water is complex).

14. *See* Protection of Environment, 40 C.F.R. § 230.3(s)(3) (2000) (stating when water has no connection to navigable body of water it is intrastate); *see also* Marni A. Gelb, Note, *Leslie Salt Co. v. United States: Have Migratory Birds Carried the Commerce Clause Across the Borders of Reason?*, 8 VILL. ENVTL. L.J. 291, 299 (1997) (setting forth basis of migratory bird rule).

15. *See* Gelb, *supra* note 14, at 299 (suggesting that without surface connection to other waters Corps needs another basis for federal regulation).

16. *See id.* at 300. The migratory bird rule was first introduced in 1985. *See id.* One of the rule's standards allows Corps to regulate waters that are or could be used as a habitat by migratory birds. *See id.* For a further discussion of the migratory bird rule, *see infra* notes 58-75 and accompanying text.

17. *See id.* at 301. Corps issued a memorandum, stating "all waterbodies which are or reasonably could be used by migratory birds are waters of the United States and should be regulated as such." *Id.* at 300. Following this memorandum, Corps began to regulate waters that were or could be a habitat for migratory birds. *See id.* at 301.

18. *See* *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985) (stating Congress chose to broadly define waters covered by CWA, allowing regulation of waters not deemed navigable).

19. *See* *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 170 (2001) [hereinafter *SWANCC*].

20. *See id.*

interstate commerce, allowing Corps to regulate those waters. Part II of this Comment provides an overview of CWA and discusses Congress' power under the Commerce Clause as well as Corps' controversial migratory bird rule. Part II proceeds with a discussion about the benefits of isolated wetlands and the case law addressing the Commerce Clause challenges to federal regulation of isolated wetlands. Part III analyzes whether Corps, under CWA, should be allowed to assert jurisdiction over isolated waters where the presence of migratory birds provides the only connection with navigable waters. Finally, Part IV discusses the impact of the Supreme Court's decision in *SWANCC*.

II. BACKGROUND

A. Overview of CWA

Federal regulation of the Nation's waters began in the nineteenth century with the limited goal of "promot[ing] water transportation and commerce."²¹ During the twentieth century, the goals of federal water regulation shifted from protection of navigability toward a concern for preventing environmental degradation.²² After water pollution emerged as a national concern in the 1960s and 1970s, Congress, in 1972, amended CWA, thereby authorizing the Environmental Protection Agency (EPA) and Corps to regulate activities affecting the "waters of the United States."²³

21. *See id.* at 177 (Stevens, J., dissenting) (citing Sam Kalen, *Commerce to Conservation: The Call for a National Water Policy and the Evolution of Federal Jurisdiction Over Wetlands*, 69 N.D. L. REV. 873, 877 (1994)). One attempt to pursue this goal was through the Rivers and Harbors Act of 1899. *See id.* The Rivers and Harbors Act § 13 "prohibited the discharge of 'refuse' into any 'navigable water' . . . 'whereby navigation shall or may be impeded or obstructed.'" *Id.* Until 1972, federal control of wetlands was limited to "waters affected by tidal flow or which have been used, or are susceptible to use, for interstate or foreign commerce." MARK A. CHERTOK, *Federal Regulation of Wetlands*, in SE98 ALI-ABA 715, at 718-19 (ALI-ABA Course of Study 2000).

The Rivers and Harbors Appropriation Act of 1899 § 10 prohibited "work" or the building of structures in navigable waters of the United States, except in accordance with a permit issued by Corps. *See id.* "Th[e] statute was intended to protect the government's interest in the navigability of waterways." *Id.* at 719.

22. *See* Kalen, *supra* note 21, at 877-879 (revealing awakening interest of using federal power to protect aquatic environment).

23. *See* Federal Water Pollution Control Act 33 U.S.C. §§ 1251-1387 (1994) [hereinafter CWA]; *see also* Adler, *supra* note 1, at 24. Under the Rivers and Harbors Act § 10, Corps' primary authority was to regulate the discharge of fill and dredge material into waterways used for interstate commerce. *See id.* Corps had the authority to issue permits for placing structures or filling materials in navigable waters. *See id.* This permitting process served as the basis for wetland permitting under CWA. *See id.*; *see also* Christopher N. Challis, *Standing Alone in Murky Waters: Evaluating the Fourth Circuit's Solitary Stance on Federal Wetlands Regulation*, 34 WAKE

Many people described CWA "as the first truly comprehensive federal water pollution legislation."²⁴

The main purpose of CWA was to institute a comprehensive long-range policy for the eradication of water pollution.²⁵ Under CWA, Congress desired to restore and maintain "the chemical, physical, and biological integrity of the Nation's waters."²⁶ Congress also sought to achieve a level of water quality that would protect and encourage the breeding of fish and wildlife.²⁷ Although CWA does not explicitly mention wetlands, the legislative history suggests that Congress included CWA section 404 to regulate wetlands.²⁸

Section 404 authorizes Corps to regulate the discharge of dredge material into navigable waters.²⁹ The controversy surrounding section 404 concerns the ambiguity of the term "navigable waters."³⁰ CWA has defined "navigable waters" as "waters of the United States."³¹ This nebulous definition offers little guidance, as

FOREST L. REV. 1179 (1999). Although Corps and EPA formerly regulated only "navigable waters bearing commercial ships," they have since extended their CWA jurisdiction to cover all bodies of water, despite any actual connection to a navigable water. *See id.*; *see also* Chertok, *supra* note 21, at 719 (noting CWA broadened scope of federal interest beyond simply navigation).

24. SWANCC, 531 U.S. at 179 (Stevens, J., dissenting) (quoting S. REP. NO. 92-414, at 95 (1971) (stating CWA established "a comprehensive long-range policy for the elimination of water pollution" by shifting focus of federal water regulation from protecting navigability to protecting environment)).

25. *See* S. REP. NO. 92-414, at 95 (1971), *reprinted in* 2 LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 (noting long range goal of CWA).

26. 33 U.S.C. § 1251(a) (1994); *see also* Gelb, *supra* note 14, at 291 (stating Congress promulgated CWA with intention of restoring purity of Nation's waters).

27. *See* 33 U.S.C. § 1251(a)(2) (1994). "[I]t is the national goal that . . . an interim goal of water quality which provides for the protection and propagation of fish . . . and wildlife and provides for recreation in and on the water." *Id.*; *see also* Johnston, *supra* note 11, at 13-14 (noting additional goal of CWA is protection of wildlife).

28. *See* S. REP. NO. 95-370, at 10 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4336. "[T]he systematic destruction of the Nation's wetlands is causing serious, permanent ecological damage . . . [t]he unregulated destruction of these areas is a matter which needs to be corrected and which implementation of [§] 404 has attempted to achieve." *Id.*; *cf.* Adler, *supra* note 1, at 25 (stating that while CWA broadened Corps' authority, it was not clear whether federal government had established federal authority over wetlands).

29. *See* 33 U.S.C. § 1344(a) (1994); *see also* Adler, *supra* note 1, at 24 (noting Corps' authority to issue permits for discharge of dredged material); *see also* Gelb, *supra* note 14, at 297 (explaining purpose of prohibiting certain activities is to assist CWA in achieving its goal of restoring integrity of Nation's waters).

30. *See* Gelb, *supra* note 14, at 291 (stating controversy focuses on which "waters" CWA is meant to protect).

31. 33 U.S.C. § 1362(7) (1994); *see also* Adler, *supra* note 1, at 25 (indicating navigable waters definition has been interpreted as providing Corps broader juris-

it also requires further definition. Originally, Corps read CWA's definition of "navigable waters" narrowly.³² However, environmental groups criticized the Corps' interpretation of the term, stating that Congress intended a much broader reading of "navigable waters."³³ Consequently, Corps issued new regulations that more closely reflected Congress' intent.³⁴ In these subsequent regulations, both Corps and EPA included wetlands in their definition of "navigable waters."³⁵

Corps' new regulations further define "waters of the United States" as "waters such as intrastate lakes, rivers, streams . . . mudflats, sandflats, wetlands, sloughs . . . [where] the use, degradation or destruction of which could affect interstate or foreign commerce."³⁶ The predominant view is that one of Congress' intentions behind CWA was to allow as much federal jurisdiction as possible over the Nation's waters pursuant to the Commerce

diction under CWA than it previously held under Rivers and Harbors Act); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985). The Supreme Court stated that defining "navigable waters" as "waters of the United States" makes the term "navigable" of little import. *See id.*

32. *See* Challis, *supra* note 23, at 1193 (stating Corps originally defined navigable waters as those waters traveled by ship); *see also* 39 Fed. Reg. 12,119 (1974) (defining navigable waters as "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or in the future susceptible for use for purposes of interstate or foreign commerce.").

33. *See* Bueschen, *supra* note 1, at 936 (noting Corps originally defined "navigable waters" narrowly).

34. *See* 33 C.F.R. § 328.3(a) (2000). This section of the Code of Federal Regulations provides both Corps' and EPA's definition of "waters of the United States" in pertinent part:

- (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (2) All interstate waters including interstate wetlands;
- (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
 - (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
 - (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
 - (iii) Which are used or could be used for industrial purposes by industries in interstate commerce.

Id.

35. *See id.* (defining navigable waters).

36. *Id.* (listing various bodies of water falling within definition of "waters of United States").

Clause.³⁷ In order to extend CWA's scope, Congress expanded the term "navigable waters" to cover all adjacent wetlands, any wetlands bordering traditionally navigable waters, tributaries of traditionally navigable waters and interstate waters.³⁸

The new regulations significantly expanded Corps' authority beyond the intended reach when Congress first passed CWA in 1972.³⁹ Since most wetlands exist on private land, many farmers and landowners strongly opposed the new regulations because they believed the new rules infringed on their property rights.⁴⁰ In 1985, the United States Supreme Court, in *United States v. Riverside Bayview Homes, Inc.*,⁴¹ addressed the validity of Corps' expansive definition of "waters of the United States" and stated that because Congress failed to amend CWA section 404 when it amended CWA in 1977, it was apparent that Congress agreed with Corps' definition of "waters of the United States" as it had previously been understood.⁴²

B. Commerce Clause

The United States Constitution grants the federal government only enumerated powers; Congress therefore has only those powers explicit in Article I.⁴³ The most expansive power delegated to Con-

37. See Gelb, *supra* note 14, at 298; see also SWANCC, 531 U.S. 159, 181 (2001) (Stevens, J., dissenting) (stating that Congress did not contemplate or command jurisdictional line drawn by Court in this case).

38. See LAWRENCE R. LIEBESMAN, *Overview of the Clean Water Act Section 404 Program*, in SE88 ALI-ABA 93, at 97 (ALI-ABA Course of Study 2000); see also Gelb, *supra* note 14, at 299. Courts have used this broad definition, holding "'waters' can now be man-made, seasonal and a result of government activity." *Id.* "Furthermore, the Supreme Court has held that [] Corps can invoke jurisdiction over wetlands that are merely adjacent to other waters." *Id.*

39. See Adler, *supra* note 1, at 26 (noting dramatic expansion of Corps' authority).

40. See *id.* at 26 n.202 (citing Paul Scoradi, *Measuring the Benefits of Federal Wetlands Programs* 16 (1997)) (explaining private landowners bear costs of wetlands while general public reaps their benefits).

41. 474 U.S. 121 (1985).

42. See *id.* The Supreme Court noted that Congress refused to restrict Corps' jurisdiction because of its concern that a narrow definition of "navigable waters" would improperly hinder the protection of wetlands. See *id.* The Court further stated that although it was hesitant to attribute significance to Congress' failure to act, it cannot ignore the fact that "a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention through legislation specifically designed to supplant it." *Id.*

43. See *United States v. Lopez*, 514 U.S. 549, 552 (1995). Chief Justice Rehnquist stated that Congress does not have the absolute power to regulate the business of the Nation as they see fit. See *id.* Congress only has those powers specifically set forth in Article I of the Constitution. See *id.*

gress is the power to regulate commerce among the several states.⁴⁴ In *NLRB v. Jones & Laughlin Steel Corp.*,⁴⁵ the Supreme Court held that Congress could regulate intrastate activities if those activities had such a substantial impact on interstate commerce that protection of the intrastate activities was necessary to protect the interstate commerce from any burdens.⁴⁶ After *Jones & Laughlin*, the United States Supreme Court, in *Wickard v. Filburn*,⁴⁷ adopted a new theory of interstate commerce.⁴⁸ In *Wickard*, the Supreme Court held that a non-commercial, intrastate activity that only presents a trivial impact on interstate commerce may still be regulated if the activity, taken in the aggregate with similarly situated activities, affects interstate commerce.⁴⁹

In 1995, the Supreme Court, in *United States v. Lopez*,⁵⁰ delineated a tripartite test to determine whether a certain activity is within Congress' Commerce Clause power.⁵¹ This test provides Congress may regulate "the 'channels of interstate commerce' and their use, the instrumentalities of interstate commerce [as well as] those activities that 'substantially affect' interstate commerce."⁵² In other words, the challenged act must be related to a commercial activity and have a substantial effect on interstate commerce.⁵³ The *Lopez* Court also stated that the statute at issue should be an essential part of a larger regulation of economic activity where the intent of the

44. See U.S. CONST. art. I, § 8, cl. 3. The United States Constitution grants Congress power "to regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes." *Id.*

45. 301 U.S. 1 (1937).

46. See *id.* at 37 (using theory that if activity substantially impacts interstate commerce, then protection necessary to protect that interstate commerce).

47. 317 U.S. 111 (1942).

48. See *id.* (holding a non-commercial activity may still be subject to federal regulation under "aggregation principle").

49. *Id.*; see also Adler, *supra* note 1, at 9-10. In *Wickard*, the Supreme Court upheld a farmer's conviction for growing wheat on his own farm for his family's consumption in violation of federal agricultural production quotas. See *id.* The Court held that the government could regulate this noncommercial activity because it affected the amount of wheat he grew to sell in interstate commerce. See *id.* The aggregation principle "created a basis for congressional authority with 'no stopping point.'" *Id.*

50. 514 U.S. 549 (1995) (stating federal government is governing body with enumerated powers).

51. See Adler, *supra* note 1, at 11 (noting *Lopez* Court based its decision on narrow reading of traditional Commerce Clause test).

52. *Lopez*, 514 U.S. at 558-59 (detailing broad categories of activity that Congress may regulate under its Commerce power).

53. See *id.* at 559 (stating that since Gun Free School Zone Act neither regulates use of channels of interstate commerce, nor prohibits interstate transport of commodity, third prong of test controls).

regulation and regulatory scheme could be undercut unless Congress regulates the intrastate activity.⁵⁴

Based on these cases, it is unclear where to draw the line when determining whether an activity substantially affects interstate commerce. It is not enough to show that an activity affects the national economy.⁵⁵ Instead, the Supreme Court has been more concerned with the nature of the regulation and the regulated activities.⁵⁶ Therefore, it is clear that in determining whether an activity substantially affects interstate commerce, the Supreme Court relies more on a qualitative measure of the regulation and activity at issue than on a quantitative measure of the activity's economic impact.⁵⁷

C. Migratory Bird Rule

Under Commerce Clause jurisprudence, Corps has the authority to regulate only those isolated wetlands that have a substantial connection to interstate commerce.⁵⁸ Since, by definition, isolated wetlands are not geographically connected to other interstate bodies of water, some other nexus with interstate commerce must exist in order for Corps to assert jurisdiction over such waters.⁵⁹ One such nexus that EPA and Corps have used to assert jurisdiction over these waters is migratory birds' use of the wetlands, a rationale that gave birth to the migratory bird rule.⁶⁰ Corps began asserting juris-

54. *Id.* at 561 (stating Gun Free School Zone Act is criminal statute, lacking essential part in larger regulation and having nothing to do with commerce).

55. Adler, *supra* note 1, at 13 (quoting *Brzonkala v. Virginia Polytechnic & State University*, 935 F. Supp. 779, 792 (W.D. Va. 1996)) (finding *Lopez* did not consider whether gun possession in school zones had a substantial impact on interstate commerce by looking at aggregate economic impact of gun possession in schools across country).

56. *See id.* (observing Court more concerned with qualitative issues).

57. *See id.* at 14. Under this test, the Supreme Court must determine if the activity is commercial and analyze the regulation's impact on the Nation's federalist system. *See id.*

58. *See Bueschen, supra* note 1, at 936-37 (revealing not every isolated wetland is subject to federal regulation).

59. *See* 40 C.F.R. § 230.3(s)(3) (1993) (defining "waters of the United States" as "[a]ll other waters . . . [where] use, degradation or destruction of which could affect interstate or foreign commerce.").

60. *See Liebesman, supra* note 38, at 102. In a 1985 legal opinion, EPA's General Counsel stated that waters that are or could be used by migratory birds were within CWA's coverage. *See id.* EPA also included within that coverage waters that are or could be used by waterfowl and endangered species. *See id.*; *see also* Michael J. Gerhardt, *Federal Environmental Regulation in a Post-Lopez World: Some Questions and Answers*, 30 ENVTL. L. REP. 10980, 10986 (2000). Corps and EPA have interpreted "could affect interstate or foreign commerce" as allowing federal jurisdiction over wetlands based on the presence of migratory birds, regardless of their proximity to navigable or interstate waters. *See id.*

diction over waters that migratory birds could use as a habitat to provide the necessary connection to interstate commerce, thus enabling them to apply CWA to isolated wetlands.⁶¹ Corps promulgated the rule in 1985 as an attempt to clarify the scope of its jurisdiction.⁶² The migratory bird rule, which prohibits the destruction of any wetlands that may be frequented by migratory birds, has caused considerable controversy.⁶³ Opponents view the rule as an impediment to both commercial and private development.⁶⁴

The migratory bird rule states that CWA section 404(a) extends to intrastate waters that "are or would be used as [a] habitat under birds protected by Migratory Bird Treaties or that "are or would be used as habitat by other migratory birds which cross state lines. . . ."⁶⁵ This statement forms the basis of the test that courts apply to determine whether an isolated wetland is subject to federal regulations under CWA.⁶⁶ The central issue in cases that use the migratory bird rule generally becomes whether applying CWA to isolated waters exceeds Congress' Commerce Clause powers.⁶⁷

61. See Gelb, *supra* note 14, at 301 (observing CWA's application to isolated wetlands following inclusion of language "all water bodies which could be used by migratory birds" in its regulations).

62. See *id.* (noting reason for enacting migratory bird rule).

63. See Gerhardt, *supra* note 60, at 1-2 (remarking controversy based on broad assertion of federal jurisdiction of "any waters that 'could affect' interstate commerce").

64. See *id.* at 2 (stating Corps is regulating private property with no direct connection to interstate waters).

65. 51 Fed. Reg. 41,217 (Nov. 13, 1986).

66. See Bueschen, *supra* note 1, at 941 (proposing that isolated wetlands substantially affect interstate commerce and should be protected under CWA). The premise of the migratory bird rule is that migratory birds serve as a sufficient nexus between isolated wetlands and interstate commerce. See *id.* at 941-42. Courts have recognized that loss of habitat is the leading cause of declining migratory bird populations and that the destruction of isolated wetlands reduces the amount of interstate commerce money spent on migratory bird recreational activities, such as watching, hunting and photographing migratory birds. See *id.*; see, e.g., *Leslie Salt Co. v. United States*, 896 F.2d 354, 360 (9th Cir. 1990) (affirming Commerce Clause and CWA are broad enough to extend Corps' jurisdiction to waters that may provide habitat for migratory birds); *Hoffman Homes, Inc. v. EPA*, 999 F.2d 256, 259 (7th Cir. 1993) (allowing migratory birds to serve as connection between isolated wetlands and interstate commerce, but requiring substantial evidence that isolated wetland in question is proper habitat for migratory birds).

67. See Gelb, *supra* note 14, at 301. Most courts hold that the Commerce Clause and, therefore, CWA are broad enough to allow Corps jurisdiction over isolated wetlands that prove to be a migratory bird habitat. See *id.* The Supreme Court in *Hoffman Homes* compared the presence of migratory birds with the people who come to observe them. See *id.* at 302. The Court found that destroying migratory birds' habitat would decrease the number of people who travel across state lines to observe, hunt, photograph and trap them. See *id.*

EPA and Corps state in their regulations that the actual or potential use of isolated wetlands by migratory birds provides a sufficient nexus to interstate commerce, therefore subjecting isolated wetlands to CWA jurisdiction.⁶⁸ Courts have recognized that the loss of habitat is the primary cause of the declining migratory bird population.⁶⁹ Also, since people spend billions of dollars each year watching, hunting, and photographing migratory birds, courts have realized that destruction of wetlands substantially diminishes the amount of money spent on migratory bird recreational activities.⁷⁰

Until recently, courts were split on whether CWA section 404 can be applied to isolated wetlands because those bodies provide a habitat for migratory birds. The United States Court of Appeals for the Ninth Circuit, in *Leslie Salt Co. v. United States*,⁷¹ that the presence of migratory birds on the property provided a sufficient nexus between the regulated activity and interstate commerce.⁷² Conversely, the Seventh Circuit in *Hoffman Homes, Inc. v. EPA*⁷³ found that the isolated wetlands at issue were outside the scope of CWA.⁷⁴ In *Hoffman Homes*, the Seventh Circuit applied the rule narrowly, requiring substantial evidence demonstrating that an isolated wetland is a suitable habitat for migratory birds.⁷⁵

68. See Liebesman, *supra* note 38, at 104 (setting forth basis of migratory bird rule).

69. See Gelb, *supra* note 14, at 302 (remarking cumulative loss that destruction of wetlands causes could potentially prove to be a significant burden on interstate travelers); see also, e.g., *Hoffman Homes*, 999 F.2d at 261. Millions of people spend more than \$600 million each year hunting, trapping and observing migratory birds. *Id.*

70. See Bueschen, *supra* note 1, at 942 (noting loss of habitat is primary cause of declining migratory bird populations).

71. 55 F.3d 1388 (9th Cir. 1995), *aff'd* 820 F. Supp. 478 (N.D. Cal. 1992), *cert. denied sub nom.* *Cargill v. United States*, 116 S. Ct. 407 (1995).

72. See *id.* at 1395. In light of the broad purposes both the language of CWA as well as the legislative history evince, it was Congress' intent to extend CWA jurisdiction over waters of the United States to the maximum extent possible under the Commerce Clause. *Id.* at 1394-95.

73. 999 F.2d 256 (7th Cir. 1993).

74. See *id.* at 262 (stating "[a]fter April showers not every temporary wet spot necessarily becomes subject to government control.>").

75. *Id.* at 261. Hoffman filled a small depression of less than one acre that had been collecting rainwater due to its impermeable clay lining. See *id.* at 257-58. EPA declared the depression an interstate wetland even though it had no surface or groundwater connection to any other body of water. See *id.* at 258-59. Hoffman Homes challenged EPA's jurisdiction over their land. See *id.* The Seventh Circuit Court of Appeals held that EPA could not offer an explanation of how filling this wetland would affect interstate commerce; therefore, EPA exceeded its authority. See *id.* at 259. After a rehearing of the case, the Seventh Circuit upheld the earlier decision, reasoning that EPA failed to provide "substantial evidence" that the filled area was suitable for a migratory bird habitat. See *id.* at 262. Nevertheless, the

D. Wetlands: What They Are and the Controversy Surrounding Them

Prior to the 1970s, private parties and state and local regulators provided the bulk of wetland protection.⁷⁶ Because wetlands had always been perceived as a hindrance to agriculture and development, they were eliminated as a general practice throughout the early twentieth century.⁷⁷ Federal wetlands regulation thus emerged in the mid-1970s when people realized the environmental importance of wetlands.⁷⁸

The National Academy of Sciences defines wetlands as "an ecosystem that depends on constant or recurrent, shallow inundation or saturation at or near the surface of the substrate."⁷⁹ Corps and EPA define wetlands as areas that are frequently and sufficiently saturated with surface or groundwater to support vegetation.⁸⁰ Wetlands generally include swamps, marshes, bogs and similar areas.⁸¹ The three factors usually used to demarcate wetlands include hydrophytic vegetation, hydric soil and hydrology.⁸²

Wetlands are also described as the most biologically productive ecosystems in America.⁸³ Wetlands purify water, thereby protecting

court upheld EPA's regulations and the general use of migratory birds to assert jurisdiction. *See id.*

76. *See* Adler, *supra* note 1, at 19. In the 1960s, the first state wetlands protection statutes were passed to protect coastal wetlands. *See id.* Before then, private organizations protected those wetlands that were important for waterfowl. *See id.*

77. *See* Chertok, *supra* note 21, at 717. "Originally, there were an estimated 221 million acres of wetlands in the continental United States; today, approximately 100.9 million acres remain." *Id.* Early in the twentieth century, wetlands were characterized as "the cause of malarial and malignant fevers" and the Supreme Court urged that "the police power is never more legitimately exercised than in removing such nuisances." *Hoffman Homes*, 999 F.2d at 262.

78. Adler, *supra* note 1, at 19 (discussing state governments' and private individuals' early efforts to protect wetlands).

79. *Id.* at 20. "Wetlands are conventionally defined as lands that are 'periodically or seasonally wet.'" *Id.*

80. *Id.* at 21; *see also* Liebesman, *supra* note 38, at 98 (defining wetlands); Chertok, *supra* note 21, at 723 (describing characteristics of wetlands).

81. 33 C.F.R. § 328.3(b) (2000); *see also* 40 C.F.R. § 230.3(t) (2000); Chertok, *supra* note 21, at 723-24 (defining wetlands).

82. *See* Liebesman, *supra* note 38, at 98. Hydrology exists when the wetland is inundated by either surface flow or groundwater for approximately one week of the growing season. *See id.* "An area has hydrophytic vegetation when, under normal circumstances, (1) more than fifty percent of the dominant species are either obligate wetland plants, facultative wetland plants, or facultative plants, or (2) the species present yield a certain frequency or occurrence value." *Id.* Hydric soils can be identified by comparing soil color at specific depths to soil color reference charts, reflecting the anaerobic conditions typical of water-saturated soils. *See id.*

83. *See* Adler, *supra* note 1, at 21 (noting wetlands provide various ecological values important to our ecosystem).

surface and ground water, prevent floods by retaining and slowing the release of excess water, and provide a habitat for certain species.⁸⁴ In addition, wetlands provide food for aquatic animals, areas for the feeding and breeding of different types of fish, wintering grounds for waterfowl as well as numerous other benefits to wildlife, particularly migratory birds.⁸⁵ Moreover, many endangered species depend on wetlands for survival.⁸⁶

"Adjacent wetlands" are wetlands separated from other waters by man-made dikes or barriers.⁸⁷ Corps has interpreted CWA section 404 to include jurisdiction over adjacent wetlands – wetlands connected to other bodies of water.⁸⁸ Adjacent status may be shown by an ecological relationship, through groundwater or surface water or by separation due to man-made barriers.⁸⁹ A body of water is isolated rather than adjacent if there is neither an ecological nor a hydrological relationship nor contiguity to other waters of the United States.⁹⁰

Isolated wetlands perform many of the same functions as adjacent wetlands.⁹¹ For example, isolated wetlands control floods and

84. See Chertok, *supra* note 21, at 717. The role of wetlands in flood prevention became apparent during the 1993 flooding along the Mississippi River. See *id.* Wetlands also purify storm water by filtering out nutrients and pollutants, protecting the surface and ground water. See *id.*; see also Adler, *supra* note 1, at 21 (noting values of wetlands).

85. See *id.* Not only are wetlands beneficial for purifying water and preventing floods, but they are also beneficial to wildlife and aquatic animals. See *id.*

86. See Chertok, *supra* note 21, at 717. "They provide nesting, wintering, resting and feeding grounds for numerous species of migratory waterfowl. Estuaries provide critical food sources, spawning grounds and nurseries for coastal fish and shellfish on both coasts. Many endangered or threatened species are heavily dependent on wetlands for continued survival." *Id.*

87. Liebesman, *supra* note 38, at 97 (setting forth characteristics of wetlands).

88. See Chertok, *supra* note 21, at 727. The Supreme Court, in *Riverside*, upheld this interpretation. See *id.* Corps' regulation states that adjacent means, "bordering, contiguous, or neighboring," but provides no other guidance. See *id.* at 727-28.

89. See *id.* at 728 (noting characteristics of adjacent wetlands).

90. See *id.* The lack of continuity or ecological relationship to other waters of the United States makes the wetlands isolated rather than adjacent. See *id.*; see also Liebesman, *supra* note 38, at 102. These isolated waters are within the purview of CWA if their "use, degradation, or destruction could affect interstate or foreign commerce." See *id.* Corps' regulations provide examples of the kinds of activities that "could affect" interstate commerce, bringing isolated wetlands within the purview of CWA. See *id.* They include: "(i) [Waters] [w]hich are or could be used by interstate or foreign travelers for recreational purposes; or (ii) [Waters] [f]rom which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (iii) [Waters] which are used or could be used for industrial purposes by industries in interstate commerce." 33 C.F.R. § 328.3(a)(3)(i-iii) (2000).

91. See Bueschen, *supra* note 1, at 940 (remarking that isolated wetlands provide many of same benefits as adjacent wetlands).

filter pollutants from the water.⁹² Isolated wetlands affect water sources and communities that do not appear to be connected on the surface, but have a subsurface connection to bodies of water.⁹³ Isolated wetlands also provide habitat, food and resting areas for migratory birds.⁹⁴ The destruction of isolated wetlands has many repercussions, such as an increase in water pollution and flooding.⁹⁵ Due to the widespread impact of environmental problems, an activity that seems localized may affect areas on a national and even global scale.⁹⁶

Isolated wetlands were previously perceived as having minimal value because it was thought that they did not perform the same functions as adjacent wetlands.⁹⁷ Scientific studies, however, have shown that, aside from providing a habitat for migratory birds, isolated wetlands serve a number of important ecological functions advancing CWA goals, including flood control, water pollution diminution and water quality improvement.⁹⁸

Moreover, some isolated wetlands have subsurface connections to other bodies of water while others have an ecological connection to lakes, streams and other wetlands serving as habitat for migratory birds.⁹⁹ Courts have recognized that, as a result of the billions of dollars spent on migratory bird recreational activities, the destruction of their habitat, isolated wetlands, would have a substantial impact on interstate commerce.¹⁰⁰

92. *See id.* (mentioning some similarities between isolated and adjacent wetlands).

93. *See id.* (remarking that although isolated wetlands are not linked on the surface with any other body of water, subsurface connections exist).

94. *See id.* (revealing isolated wetlands' ecological functions). As a result of the similarities between isolated wetlands and adjacent wetlands, there is very little explanation for the legislation and judicial decisions that hold isolated wetlands as being far less significant than adjacent wetlands. *See id.*

95. *See id.* at 953 (noting environmental hazards that would follow from destruction of isolated wetlands).

96. *See Bueschen, supra* note 1, at 953. When the cumulative effects of a local activity are considered, the consequences may be national or global because environmental problems unfortunately are not contained within state lines. *See id.*

97. *See id.* at 954 (arguing that contrary to this theory, destruction of isolated wetlands would adversely affect interstate commerce).

98. *See id.* The benefits of protecting isolated wetlands include: flood control, ground water purification, water quality improvement and diverse species' habitat. *See id.* Relying only on the presence of migratory birds to establish a connection to interstate commerce ignores the various functions that isolated wetlands serve, also affecting interstate commerce. *See id.*

99. *See id.* at 955 (noting term "isolated wetlands" seems to be misnomer because some isolated wetlands have subsurface connections to other bodies of water).

100. *See id.* (noting significance of isolated wetlands to interstate commerce).

Notwithstanding the fact that isolated wetlands promote biodiversity, they also serve many commercial purposes that substantially affect interstate commerce. Isolated wetlands assist in improving the quality of both surface and ground water.¹⁰¹ In addition, isolated wetlands assist both in flood control, absorbing storm and rain runoffs that would otherwise flow into lakes, rivers and sewer systems, and in filtering out the pollutants.¹⁰² Consequently, isolated wetlands substantially reduce the amount of pollution that reaches surface waters and sewer systems.¹⁰³ For this reason, wetlands perform the commercial function of improving surface water quality, reducing water treatment costs by as much as seventy billion dollars.¹⁰⁴

Isolated wetlands serve several commercial functions such as controlling floods, cleansing water pollutants and contributing to groundwater supplies.¹⁰⁵ Additionally, isolated wetlands' ecological connections to other wetlands contribute to biological diversity and support the migratory bird and endangered species populations.¹⁰⁶ Thus, even though the filling of isolated wetlands can be seen as an intrastate activity, the consequences of destroying them reach far beyond any state lines.¹⁰⁷

E. Case Law

In *Riverside*, the United States Supreme Court addressed whether CWA authorizes Corps to regulate the discharge of fill or dredged material into adjacent wetlands.¹⁰⁸ Although this decision did not specifically address whether CWA extends to isolated wetlands, much of the Supreme Court's reasoning remains relevant to

101. See Bueschen, *supra* note 1, at 957. This is particularly true in farming areas where storm water runoff is drenched with high concentrations of phosphorous and nitrogen due to the use of fertilizer. See *id.* at 956-57. The polluted runoffs from heavy rains flow directly into lakes, rivers and sewer systems. See *id.* at 957. Isolated wetlands are able to absorb the water and filter out the pollutants. See *id.*

102. See *id.* (stating isolated wetlands drastically reduce amount of pollutants that eventually reach these other destinations).

103. See *id.* Isolated wetlands have been incorporated into storm water runoff treatment systems because of their ability to remove pollutants while absorbing water. See *id.*

104. See *id.* (discussing commercial function of isolated and other wetlands).

105. For a more detailed discussion of the commercial functions of isolated wetlands, see *supra* notes 101-107 and accompanying text.

106. For a further discussion of the importance of wetlands' function, see *supra* notes 83-100 and accompanying text.

107. See Bueschen, *supra* note 1, at 952-53 (discussing state regulation of such activity).

108. See *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985).

isolated wetlands because they perform many of the same functions as adjacent wetlands.¹⁰⁹

The Court, in *Riverside*, stated that one of Congress' intentions in promulgating CWA was to protect aquatic ecosystems.¹¹⁰ As a result, the Supreme Court voted to uphold Congress' broad definition of "waters of the United States."¹¹¹ The Supreme Court held that adjacent wetlands did fall within the scope of "waters" protected by CWA and were, therefore, subject to Corps' jurisdiction.¹¹²

Although the *Riverside* Court never mentioned isolated waters, the Ninth Circuit Court of Appeals, in *Leslie Salt Co. v. United States*,¹¹³ held that isolated waters have a connection to the aquatic ecosystem because they serve as a habitat for migratory birds.¹¹⁴ Therefore, the Court implied that Corps could assert Commerce Clause jurisdiction over isolated waters based on the migratory bird rule.¹¹⁵ The Ninth Circuit stated that the plain language of CWA made it clear that Congress intended the statute to have a broad effect.¹¹⁶ Although CWA does not specifically mention isolated wetlands, the Ninth Circuit, in *Leslie Salt*, deduced that the legislative

109. For a further discussion of the similarities between isolated wetlands and adjacent wetlands, see *supra* notes 91-96 and accompanying text.

110. *Riverside*, 474 U.S. at 132-33 (discussing Congressional intent).

111. See Liebesman, *supra* note 38, at 97. Corps' interpretation was consistent with Congress' concern when enacting CWA, namely protecting water quality and aquatic ecosystems. See *id.*

112. See Bueschen, *supra* note 1, at 939-40. The Supreme Court stated that they were upholding Corps' regulatory authority over adjacent wetlands because of the important part they play in "protecting and enhancing water quality." See *id.*; see also Challis, *supra* note 23, at 1194. The Supreme Court held that Corps' regulation of wetlands adjacent to other bodies of water furthered congressional intent because of the beneficial effect these wetlands have on the water quality of neighboring water bodies. See *id.* The Supreme Court, however, made it clear that the specific issue before it was whether Corps had the authority to regulate wetlands that were not adjacent to other bodies of water. See *id.*

113. 55 F.3d 1388 (9th Cir. 1995).

114. See Gelb, *supra* note 14, at 309-10. The Ninth Circuit highlighted CWA §§ 1251(a)(2) and 1343(c)(1), stating Congress' goal, under CWA, is to "protect and consider the effect of disposal of pollutants on . . . fish, shellfish and wildlife." *Id.* (citing *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1394 (9th Cir. 1995)). The Ninth Circuit also found support for its proposition in the Supreme Court's analysis of CWA in *Riverside*. See *id.* The Ninth Circuit held that, similar to the wetlands in *Riverside*, the seasonal ponds in *Leslie Salt* "may have a connection to the aquatic ecosystem in their role as habitat for migratory birds." *Leslie Salt*, 55 F.3d at 1395.

115. See Challis, *supra* note 23, at 1196 (explaining Commerce Clause was broad enough to cover jurisdiction based on migratory bird rule); see also Liebesman, *supra* note 38, at 103. "The [Ninth Circuit] held that man-made wetlands were subject to CWA jurisdiction." *Id.*

116. See Gelb, *supra* note 14, at 309 (noting Congress' intent in applying CWA broadly).

history of the statute demonstrated Congress' intent to extend CWA's jurisdiction to the maximum extent possible under the Commerce Clause.¹¹⁷ The Ninth Circuit concluded that the Commerce Clause and, therefore, CWA extends Corps' jurisdiction over waters that may be used as migratory birds' habitat.¹¹⁸

In *Hoffman Homes Inc. v. EPA*,¹¹⁹ the Seventh Circuit Court of Appeals applied the migratory bird rule much more narrowly.¹²⁰ The Seventh Circuit held that interpreting CWA to include control over areas that could potentially, but do not actually, affect interstate commerce was reasonable.¹²¹ Therefore, it upheld migratory birds' use of an area as sufficient grounds to assert Corps' jurisdiction.¹²² The *Hoffman Homes* court, however, clarified that, in order to assert jurisdiction over isolated wetlands based on their actual or potential use as migratory birds' habitat, Corps and EPA are required to make a substantial showing that the isolated wetland is a fitting habitat for migratory birds, not merely that it could serve as habitat.¹²³

Standing apart from its sister circuits, the Fourth Circuit Court of Appeals, in *United States v. Wilson*,¹²⁴ rejected the view that the presence of migratory birds provides a sufficient nexus to interstate commerce.¹²⁵ The *Wilson* court stated that the rule extends CWA's coverage to waters that are non-navigable and intrastate based solely on the idea that the use, degradation or destruction of these waters "could" affect interstate commerce.¹²⁶ The Fourth Circuit held that Corps' regulations defining "waters of the United States" expanded the phrase far beyond its intended limit, thereby exceed-

117. See *id.* The court, in *Leslie Salt*, asserted that CWA's legislative history indicates Congress' intent to "extend [CWA] jurisdiction over waters of the United States to the maximum extent possible under the Commerce Clause." *Id.*

118. See *Leslie Salt*, 55 F.3d at 1396.

119. 999 F.2d 256 (1993).

120. See *id.* at 262 (upholding application of migratory bird rule).

121. See Challis, *supra* note 23, at 1197-98. The Seventh Circuit held that the Corps and EPA regulations, defining waters as those whose destruction could affect interstate commerce, was proper under the Commerce Clause. See *id.*

122. See *id.* (discussing court's validation of migratory bird rule).

123. See Bueschen, *supra* note 1, at 942. The *Hoffman* Court applied the migratory bird rule much more narrowly than the Ninth Circuit. See *id.*

124. 133 F.3d 251 (4th Cir. 1997).

125. See *id.* (holding migratory birds did not provide sufficient nexus to interstate commerce).

126. See Johnston, *supra* note 11, at 9. The migratory bird rule does not require that the regulated activity have a substantial effect on interstate commerce, nor does it require that the covered waters have any connection to navigable waters. See *id.* For this reason, the Fourth Circuit has determined that the migratory bird rule poses grave constitutional problems in light of *Lopez*. See *id.*

ing congressional authority under the Commerce Clause.¹²⁷ The *Wilson* majority concluded that without a sufficient nexus to interstate commerce, Corps would be stretching its jurisdiction beyond the authority granted to it under the Commerce Clause.¹²⁸

F. The SWANCC Decision

In January, 2001, the United States Supreme Court, in *SWANCC*, held that CWA section 404(a) does not extend to isolated wetlands that provide habitat for migratory birds.¹²⁹ Petitioner, SWANCC, was a consortium of suburban Chicago cities and villages that united to develop a disposal site for non-hazardous waste.¹³⁰ The location they chose had been the site of a sand and gravel mining operation until about 1960.¹³¹ After the 1960s, the site was abandoned and its remnant excavation trenches evolved into permanent and seasonal ponds varying in size and depth.¹³² These ponds provided a habitat for migratory birds.¹³³

The Supreme Court's analysis of the *SWANCC* decision began with an overview of CWA's goals and purpose. The Supreme Court noted that, by passing CWA, Congress chose to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the develop-

127. See Adler, *supra* note 1, at 3. Such a broad scope of regulatory authority would violate the Supreme Court's ruling in *Lopez*, reiterating constitutional limits of federal regulatory jurisdiction. See *id.* Judge Niemeyer of the Fourth Circuit stated, "this was an intolerable expansion of the jurisdiction provided for under the CWA." *Id.*

128. See Liebesman, *supra* note 38, at 104. In *Wilson*, the wetlands were more than six miles from the closest federal waters and hundreds of yards from the nearest creek. See *id.*

129. See *SWANCC*, 531 U.S. 159 (2001). A consortium of municipalities sued Corps, challenging its exercise of jurisdiction over an abandoned sand and gravel pit on which the municipalities planned to develop a disposal site for non-hazardous waste. See *id.* at 162-63. Petitioner, SWANCC, also challenged Corps' denial of a permit to develop this site. See *id.* The United States District Court for the Northern District of Illinois granted Corps' summary judgment on the jurisdictional issue. See *id.* at 165. The consortium voluntarily dismissed the remainder of its claims, but appealed the district court's grant of summary judgment. See *id.* The Seventh Circuit nonetheless affirmed the District Court's grant of summary judgment. See *id.* at 166. The United States Supreme Court granted certiorari, holding that the Corps' rule, extending CWA's definition of "navigable waters" to include intrastate waters used as migratory birds' habitat, exceeded the authority CWA granted Corps. See *id.*

130. See *id.* at 162-63 (describing petitioner municipalities).

131. See *id.* at 163 (describing mining site in question).

132. See *id.* (detailing history and deterioration of site).

133. See *id.* (noting that Corps' asserted jurisdiction over site only after being informed of migratory birds' presence).

ment and use . . . of land and water resources.”¹³⁴ In scrutinizing the purpose of CWA, the Supreme Court stated that CWA does not fairly support the migratory bird rule.¹³⁵ To rule in favor of Corps, the Supreme Court stated it would have to hold that Corps has jurisdiction over ponds that are not adjacent to open bodies of water, and that the text of the statute does not allow this.¹³⁶

Corps urged the Supreme Court to take a step beyond *Riverside*, holding isolated ponds subject to the definition of “navigable waters” under CWA section 404(a) merely because they serve as a habitat for migratory birds.¹³⁷ The SWANCC Court, however, declined, finding that Corps exceeded its authority in regulating the “pond” in question.¹³⁸ The language of the SWANCC opinion narrowly limited the decision to determining the constitutionality of regulating that particular pond based on statutory construction.¹³⁹ The SWANCC Court refused to consider the more general question of whether, under the Commerce Clause, Corps could regulate isolated waters due to the presence of migratory birds.¹⁴⁰

III. ANALYSIS

A. Commerce Clause Challenge

Under federal regulations, evaluating CWA jurisdiction of a wetland involves a two step analysis, determining (1) whether the

134. Compare SWANCC, 531 U.S. at 166-67 (citing 33 U.S.C. § 1251(a) and (b) (1994)), with *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-33 (1985) (reasoning that CWA seeks to empower federal government to protect resources).

135. See SWANCC, 159 U.S. at 167. The SWANCC Court noted that Corps interpreted “waters of the United States” to cover the abandoned gravel pit at issue because migratory birds used it as a habitat. See *id.*

136. See *id.* The SWANCC Court referred to their *Riverside* decision, stating that the significant nexus between the wetlands and “navigable waters” enlightened that decision. See *id.* Here, no such nexus existed. See *id.*

137. *Id.* at 171. The Supreme Court, in SWANCC, noted that counsel for respondent conceded at oral argument that the *Riverside* ruling would presume that the word “navigable,” as used in CWA, does not have independent significance. See *id.* The SWANCC Court stated that, in *Riverside*, the word navigable was of limited effect. See *id.* The Court thus concluded that § 404(a) extended to non-navigable waters adjacent to open bodies of water. See *id.* at 172. The SWANCC Court, however, stated that “it is one thing to give a word limited effect and quite another to give it no effect whatever.” *Id.*

138. See *id.* at 174 (holding migratory bird rule, as applied to balefill site, exceeded authority granted by CWA).

139. See SWANCC, at 174. “We hold that 33 C.F.R. § 328.3(a)(3), as clarified and applied to petitioner’s balefill site pursuant to the ‘Migratory Bird Rule,’ . . . exceeds the authority granted to respondents under § 404(a) of the CWA.” *Id.* (citations omitted) (emphasis added).

140. See SWANCC, 531 U.S. at 162 (narrowing scope of opinion).

area at issue constitutes a wetland, and (2) whether it is a "water of the United States" subject to CWA jurisdiction.¹⁴¹ In its regulations, however, Corps established the physical characteristics of wetlands.¹⁴² Once an area meets these physical characteristics, Corps next determines whether CWA jurisdiction extends to the particular wetland.¹⁴³ CWA regulates only navigable waters, also defined as "waters of the United States."¹⁴⁴ Consideration of whether a body of water is considered to be a "water of the United States" depends primarily on its nexus to interstate commerce.¹⁴⁵

In order to establish the necessary connection between isolated wetlands and interstate commerce to support federal jurisdiction, Corps and EPA often rely on the use of isolated wetlands as a habitat by migratory birds.¹⁴⁶ Whether isolated wetlands are subject to federal jurisdiction based solely on the presence of migratory birds, however, depends on whether the Commerce Clause is interpreted broadly or narrowly.¹⁴⁷ Thus, Corps' authority to regulate waters on this basis has created great controversy.

In *United States v. Lopez*,¹⁴⁸ the Supreme Court set forth three categories of activities that Congress may regulate under the Commerce Clause.¹⁴⁹ The *Lopez* Court stated that requiring a nexus between the regulated activity and interstate commerce was necessary

141. See Challis, *supra* note 23, at 1192 (explaining process of determining whether wetlands are subject to CWA jurisdiction).

142. See *id.* (stating Corps and EPA have essentially same regulations concerning wetlands jurisdiction). For a discussion of the characteristics of wetlands, see *supra* notes 79-82 and accompanying text.

143. See Challis, *supra* note 23, at 1192 (stating CWA jurisdiction exists only where wetlands are first found to exist).

144. See *id.* Under 33 C.F.R. § 328.1, Corps has the authority to further define "waters of the United States." See *id.* For a further discussion of the definition and interpretation of "navigable waters," see *supra* notes 30-38 and accompanying text.

145. See Challis, *supra* note 23, at 1192. Intrastate lakes, mudflats, wetlands, sloughs and waters whose use, degradation and destruction could affect interstate commerce are among the bodies of water that are contained within state lines. See *id.*

146. See Chertok, *supra* note 21, at 729. This premise for jurisdiction is drawn from a 1985 EPA General Counsel Opinion. See *id.*; see also Bueschen, *supra* note 1, at 941. The migratory bird rule is a test courts apply to determine whether an isolated wetland may be subject to federal regulation under CWA. See *id.* For a further discussion of the migratory bird rule, see *supra* notes 58-75 and accompanying text.

147. See Chertok, *supra* note 21, at 731 (noting federal jurisdiction over isolated wetlands hinges on liberal or expansive interpretation of Commerce Clause).

148. 514 U.S. 549 (1995).

149. See Challis, *supra* note 23, at 1198-99. Congress may regulate the use of the channels of interstate commerce, the instrumentalities of interstate commerce, even if the threat may come from intrastate activities, and those activities that substantially affect interstate commerce. *Id.*

to constrain federal power.¹⁵⁰ Whether an activity substantially affects interstate commerce is fact-specific and must be determined on a case-by-case basis.¹⁵¹ According to the *Lopez* Court, the Nation's dual system of government necessitates limiting the federal government in this way.¹⁵²

Whether the Commerce Clause allows regulation of the activity at issue is determined by the application of a two-prong test.¹⁵³ Under this test, "the regulated activity must qualify as economic or commercial in nature . . . [and] the activity must have a substantial effect on interstate commerce."¹⁵⁴ The *Lopez* Court held that the activity must have a definite and tangible connection to interstate commerce.¹⁵⁵ The Supreme Court also stated that under the aggregate effect theory, if it is reasonable to conclude that the impact of the activity, if continued, would substantially affect interstate commerce, then the activity meets the second prong of the test.¹⁵⁶ Thus, the burden falls on Corps and EPA to show a substantial connection between the isolated wetland and interstate commerce.¹⁵⁷ Corps can show that activities taking place in a certain wetland are

150. See *Lopez*, 514 U.S. at 564-66. The majority was concerned with the blanket of authority the federal government would be given if the Court upheld the Gun-Free School Zone Act. See *id.*

151. See *id.* at 566. The determination of whether an activity substantially affects interstate commerce is one of degree. See *id.*

152. See *id.* at 557 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)). "[T]he scope of the interstate commerce power . . . may not be extended . . . to embrace effects upon interstate commerce so indirect and remote that to embrace them . . . would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *Id.*

153. See *id.* at 561-63.

154. See Challis, *supra* note 23, at 1201. If the filling of wetlands is considered an intrastate activity of private landowners, it cannot be considered a commercial activity. See *id.* A homeowner, for example, raising an area of land constantly holding rainwater for his own private purposes should not be classified as a commercial activity. See *id.* There is a strong argument, however, that activities of corporations qualify as economic or commercial activities. See *id.* Therefore, it is reasonable to assume that such activities satisfy the first prong of the *Lopez* test. See *id.*

155. See *id.* at 1202. The *Lopez* Court essentially stated that the substantial effect must actually exist. See *id.* The Supreme Court, in *Lopez*, declined to allow Congress to regulate activities having a potential impact on interstate commerce. See *id.*

156. See *id.* The majority, in *Lopez*, stated that the regulated activity could be an economic activity that, through repetition elsewhere, will have a substantial impact on interstate commerce. See *id.*

157. See *id.* at 1203-04. If Corps can demonstrate that migratory birds' habitats were continuously destroyed, that the migratory bird population was thus substantially impacted and that a sufficient nexus existed between migratory birds and interstate commerce, then Corps may establish jurisdiction over the isolated wetlands. See *id.* In his article, Challis suggests that not every Supreme Court Justice is prepared to conclude that migratory birds themselves constitute a sufficient nexus to interstate commerce. See *id.*

substantially harmful to interstate waters, then Corps' jurisdiction will be upheld.¹⁵⁸

The underlying issue centers on whether the use of isolated wetlands and intrastate waters by migratory birds provides a sufficient connection to interstate commerce and "navigable waters" to allow federal regulation pursuant to both CWA and the Commerce Clause.¹⁵⁹ The recent SWANCC decision thus demonstrates how the migratory bird rule has the potential of seriously intruding on state and local authorities' powers preserved by the Framers of the United States Constitution as a fundamental aspect of our federalist government system.¹⁶⁰

1. Corps' Regulation of Isolated Wetlands Exceeds its Commerce Clause Power

The main argument against Corps' assertion of jurisdiction over isolated waters is that Corps lacks authority under CWA to regulate waters that are in no way connected to a navigable body of water.¹⁶¹ An alternative argument to Corps' jurisdiction is that the regulation of waters having no connection to interstate commerce exceeds the scope of federal power under the Commerce Clause.¹⁶² This expansive approach to federal power under the Commerce Clause results in essentially every puddle being subject to CWA jurisdiction.¹⁶³

In response to this argument, supporters of the migratory bird rule argue that a "habitat" is not only a spot where a bird might go to rest for a few minutes, but also a natural living and growing area

158. *See id.*

159. *See* Timothy S. Bishop, et al., *One for the Birds: The Corps of Engineers' "Migratory Bird Rule,"* 30 ENVTL. L. REP. 10633, 10633 (August 2000). Despite Corps' belief, many courts and commentators do not agree with the migratory bird rule. *See id.* The Fourth Circuit, in *United States v. Wilson*, rejected such a broad jurisdictional reach. *See id.* (citing *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997)). The Ninth Circuit, which approved the migratory bird rule in *Leslie Salt*, nevertheless stated that the rule "certainly tests the limits of Congress' commerce powers and . . . the bounds of reason." *Id.* Furthermore, academic commentators question the constitutionality of the rule after *Lopez*. *See id.*

160. *See id.* The Seventh Circuit's decision, in SWANCC, allowed Corps to halt the development of a solid waste balefill without showing even the slightest connection between the wet areas on the land and either interstate water or commerce. *See id.* The Supreme Court reversed this decision. *See id.*

161. *See id.* at 10635.

162. *See id.* Opponents to Corps' asserted jurisdiction over abandoned gravel pits posited these arguments in SWANCC.

163. *See* Johnston, *supra* note 11, at 10. Petitioner, SWANCC, made this argument in response to the Seventh Circuit's approach to Commerce Clause analysis. *See id.*

for both plants and animals.¹⁶⁴ The problem, however, with the migratory bird rule as a basis for asserting federal jurisdiction over these waters is that migratory birds will generally settle anywhere.¹⁶⁵ Thus, basing federal jurisdiction on the possibility of the presence of migratory birds would defeat the courts' effort to limit the power of the federal government in our federalist system.¹⁶⁶

2. *Do Migratory Birds Substantially Affect Interstate Commerce?*

If the migratory bird rule can be justified at all, it can only be done under the third prong of federal regulatory power as presented in *Lopez*, namely the regulation of activities that "substantially affect" interstate commerce.¹⁶⁷ This prong can be satisfied through the aggregation theory set forth in *Wickard v. Filburn*.¹⁶⁸ According to this principle, "a single activity that itself has no discernible effect on interstate commerce may still be regulated if the aggregate effect of that class of activity has a substantial impact on interstate commerce."¹⁶⁹ The problem, however, with justifying federal jurisdiction through the aggregation principle is the tenuous connection between the class CWA covers, "navigable waters of the United States," and the basis for federal jurisdiction, expenditures by watchers and hunters of migratory birds.¹⁷⁰

Proponents of the argument state that the destruction of migratory birds' habitat in the aggregate would affect interstate commerce because millions of Americans spend an enormous amount of money each year observing, hunting and trapping migratory birds.¹⁷¹ Since the business connected with migratory birds significantly impacts the national economy through the money spent by

164. See *id.* Prior to asserting jurisdiction under the migratory bird rule, Corps must make a factual determination that a particular body of water provides a habitat for migratory birds. See *id.*

165. See Adler, *supra* note 1, at 38 (noting problem of migratory bird rule).

166. See *id.* at 37. Corps' regulations are based on the assumption that the flight of birds across state lines creates the necessary connection to interstate commerce to justify Corps' assertion of jurisdiction over any body of water serving as a habitat for migratory birds. See *id.*

167. See Bishop, et al., *supra* note 159, at 10635. The Seventh Circuit acknowledged this point on SWANCC's appeal. See *id.*

168. 317 U.S. 111 (1942).

169. *Id.*

170. See Bishop, et al., *supra* note 154, at 10637 (analyzing aggregation principle).

171. See Johnston, *supra* note 11, at 10. The United States Census Bureau found that "approximately 3.1 million Americans spent \$1.3 billion to hunt migratory birds in 1996, and that [eleven] percent of them traveled across state lines to do so. . . . [T]hat same year 14.3 million Americans traveled to another state specifically for the purpose of observing migratory birds." *Id.*

birdwatchers and hunters, the effects of filling isolated wetlands would noticeably influence this business.¹⁷² Consequently, destruction of their habitat would diminish the amount of money spent on such recreational activities. This in turn affects interstate commerce.¹⁷³

Even though migratory birds have a subsidiary effect on interstate commerce, their effect is not substantial as required under the Commerce Clause.¹⁷⁴ In reality, the effects would be minimal. Furthermore, the remote possibility that interstate travelers may be affected should not be determinative of whether migratory birds substantially affect interstate commerce.¹⁷⁵

Justice Thomas' dissent in the Supreme Court's denial of certiorari, in *Leslie Salt Co.*, stated that, after *Lopez*, the activity must *substantially* affect interstate commerce in order for Congress to have the authority to regulate it.¹⁷⁶ According to Justice Thomas, the migratory bird rule cannot meet this prong of the test because the dependence of substantial interstate commerce upon the continued existence of migratory birds does not give Corps per se jurisdiction over every property migratory birds could use as a habitat.¹⁷⁷

3. *The Migratory Bird Rule: A Permissible Interpretation of CWA?*

Proponents of the migratory bird rule argue that the rule is a permissible interpretation of CWA because CWA covers as many wa-

172. Bishop, et al., *supra* note 159, at 10637 (highlighting Corps' defense against Commerce Clause challenges is aggregation principle).

173. *See id.* at 10635. As a result of the number of people who spend large amounts of money on migratory bird recreational activities, the destruction of the birds' habitat has great effects upon interstate commerce. *See id.*

174. *See* Gelb, *supra* note 14, at 316. The effect, however, is not substantial because the birds may settle anywhere. *See* Bishop, et al., *supra* note 154, at 10637. Consequently, land that is free from migratory birds one year may serve as habitat the next year.

175. *See* Gelb, *supra* note 14, at 316-17. In the *Leslie Salt* cases, the courts never actually addressed how migratory birds substantially affect interstate commerce. *See id.* Instead, the courts only referred to the possibility that interstate travelers crossing state lines to participate in migratory bird recreational activities may be affected. *See id.*

176. *See* Adler, *supra* note 1, at 30. The Supreme Court decided *Lopez* during the course of the second *Leslie Salt* appeal. *See id.* This prompted *Leslie Salt's* successor in interest, Cargill, to seek review by the Supreme Court. *See id.* The Court, however, was not interested in revisiting the issue. *See id.* Justice Thomas dissented, noting that the Court was eventually going to have to address the issue of wetlands regulation because of the clear implications for wetlands regulations in the *Lopez* decision. *See id.*

177. *See id.* (explaining why, according to Justice Thomas, migratory bird rule could not satisfy *Lopez* test).

ters as the Commerce Clause permits.¹⁷⁸ Therefore, since congressional power under the Commerce Clause is broad enough to regulate waters on the premise that migratory birds are present, the rule is a permissible interpretation of CWA.¹⁷⁹

The rule, however, is lawless and an insult to the principles of federalism.¹⁸⁰ If one examines the language and history of CWA and considers the scope of federal commerce power as set forth in *Lopez*, it is clear that Corps should not be permitted to exercise jurisdiction over isolated waters simply because they serve as a habitat for migratory birds.¹⁸¹ The migratory bird rule allows Corps to regulate isolated waters lacking a hydrologic connection to navigable waters but used by birds crossing state lines or protected under the Migratory Bird Treaties.¹⁸² The language and history of CWA does not permit this interpretation.¹⁸³ To allow federal jurisdiction over isolated waters connected to interstate commerce by the mere possibility of migratory birds' landing alone would diminish any limitation on the federal government's Commerce Clause power.¹⁸⁴ Though the Commerce Clause grants the federal government substantial power, it does not allow the federal government limitless jurisdiction in the same manner as the migratory bird rule attempts.¹⁸⁵

On the other hand, those in favor of the migratory bird rule assert that the wetlands protected by the migratory bird rule are

178. See Bishop, et al., *supra* note 159, at 10635 (revealing Seventh Circuit's response to SWANCC's argument that migratory bird rule is not permissible interpretation of CWA).

179. See *id.* (characterizing Corps' and EPA interpretation as valid).

180. See *id.* The migratory bird rule usurps local control over decisions that are traditionally local, such as land use planning, and grants control to the federal government. See *id.*

181. See *id.*; see also *United States v. Lopez*, 514 U.S. 549, 557 (1995). The activity in question must substantially affect interstate commerce. See *id.*

182. See Bishop, et al., *supra* note 159, at 10636. The migratory bird rule grants Corps jurisdiction over intrastate isolated waters having no connection to navigable waters. See *id.*

183. See *id.* (arguing migratory bird rule should not seize jurisdiction over isolated waters with no hydrological connection to navigable waters).

184. See Gerhardt, *supra* note 60, at 10987. The Seventh Circuit, in *Hoffman Homes*, posed the rhetorical question "what area of the United States is not a potential landing spot for migratory birds?" *Id.* This situation demonstrates the problem created by allowing federal jurisdiction over waters whose only connection to interstate commerce is the possible landing of migratory birds.

185. See *id.* at 12-13. The Fourth Circuit, in *Wilson*, pointed out that the possibility migratory birds may visit accumulated waters does not form any stronger connection to interstate commerce than the gun restrictions litigated in *Lopez* and the private occupied residence in *Jones & Laughlin*. See *id.*

only isolated from the perspective of the landowner.¹⁸⁶ Even though there may not be any recreational migratory bird activities on a particular isolated wetland, that wetland may sustain the birds that are later observed or hunted.¹⁸⁷ However, basing federal jurisdiction of intrastate waters on the mere possibility that the wetland at issue *may* sustain birds that hunters *may* eventually hunt is not permissible. Allowing Corps to regulate waters based on such a tenuous connection to interstate commerce obliterates the concept of America's dual system of government.

Corps maintains that CWA authorizes the migratory bird rule because one of the goals of CWA is to protect wildlife.¹⁸⁸ Corps, however, misinterprets Congress' intention.¹⁸⁹ Congress intended its goal of protecting wildlife to be pursued within the jurisdictional limits set forth in other provisions of the Act.¹⁹⁰ Congress did not intend a separate jurisdictional grant by its reference to wildlife.¹⁹¹ If protection of wildlife were enough to establish CWA jurisdiction, "no bird-bath or ornamental pond would be safe from federal regulation."¹⁹² Even proponents of the migratory bird rule admit that it "tests the limits of Congress' Commerce Clause powers."¹⁹³

4. *Commercial or Economic Activity*

The second prong of the Commerce Clause test established in *Lopez* requires that the regulated activity be commercial or economic in nature.¹⁹⁴ Although the economic benefits of migratory birds are substantial and wide-ranging, they are no more relevant to the issue of whether the federal government can regulate wetlands

186. See *id.* at 10988 (noting that from other perspectives wetlands are not isolated).

187. See *id.* According to the natural science of bird migration, the effects of the destruction of something proven to be a habitat, in the aggregate, can be substantial to hunters and bird-watchers. See *id.*

188. See 33 U.S.C. § 1251(a)(2) (1994). "[I]t is the national goal that wherever attainable, an interim goal of water quality which provides for the protection . . . of fish, shellfish, and wildlife." *Id.*

189. See Bishop, et al., *supra* note 159, at 10636 (noting Corps misinterpreted statute by interpreting it as separate jurisdictional grant).

190. See *id.* The plain language of CWA does not allow this separate grant. See *id.*

191. *Id.* By the same token, no swimming pool would be beyond federal regulation because protecting waters for their recreational use is also a CWA goal. See *id.*

192. See *id.*

193. See Bueschen, *supra* note 1, at 941 (quoting *Leslie Salt Co. v. United States*, 896 F.2d 354, 360 (9th Cir. 1990)).

194. *United States v. Lopez*, 514 U.S. 549, 558 (1995) (emphasizing minimal economic impact).

than the economic impact of a poor educational environment was in *Lopez*.¹⁹⁵ The fact that those who desire to develop wetlands are seeking commercial gain or that they must participate in commercial activity for the development to occur is immaterial as to whether the activity falls within the jurisdictional limits set forth in *Lopez*.¹⁹⁶ Moreover, the filling of wetlands and the flight of birds across state lines are in no way commercial in character. Although it may have a commercial consequence, the commercial nexus is practically unrealistic.¹⁹⁷

B. States' Rights

Critics have stated that *Lopez* can be viewed as a decision that defends state sovereignty.¹⁹⁸ Thus, an implicit question, may be whether federal regulation intrudes on traditional state functions.¹⁹⁹ If so, it seems that, under *Lopez*, the regulation is more likely to be struck down.²⁰⁰ In *Jones & Laughlin*, the Supreme Court stated that the Commerce Clause must be interpreted in light of the Nation's dual system of government.²⁰¹ If the government were authorized to regulate areas of traditional state concern, the line

195. *Id.* In *Lopez*, the Supreme Court held that the Gun-Free School Zones Act did not regulate a commercial activity nor did it contain a requirement that the possession of the gun be connected to interstate commerce in any way. *See id.* The Court also pointed out that no matter how compelling the need for federal action is, Congress has only those powers delegated to it in Article I of the Constitution. *See id.* In his article, Adler questions whether the economic impact of a poor educational environment is not significant enough to allow for federal regulation, whether one could say that the economic benefits of wetlands are more significant and, therefore, whether federal regulation should be allowed. *See Adler, supra* note 1, at 10-11.

196. *See Adler, supra* note 1, at 34. Justice Kennedy's concurrence, in *Lopez*, stated that, theoretically, any conduct has a commercial origin or consequence, but the Commerce power cannot reach that far. *See id.* "For an activity to be commercial or economic, it must entail more than a tangential relationship to . . . economic activity. The challenged . . . regulation must itself be 'an essential part of a larger regulation of economic activity.'" *Id.*

197. *See id.* Some of the activity Corps seeks to regulate in wetlands is non-commercial - building an extension on one's home or planting a garden. *See id.* Corps' regulation is not only regulating commercial development. *See id.* Rather, it regulates activities that could have any sort of impact on wetlands. *See id.*

198. *See id.* at 14. The author believes that the majority, in *Lopez*, was concerned about the impact unrestrained Commerce power would have on federal-state relations. *See id.*

199. *See id.* This question seems more important than the commercial nature of the activity. *See id.* In *Lopez*, banning guns near schools was seen as too much of an intrusion on an area generally handled by state governments. *See id.*

200. *See Adler, supra* note 1, at 34 (hypothesizing that if federal regulation intrudes on state functions, then, under *Lopez*, it will probably be struck down).

201. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (contending Congress' power must be balanced against negative centralizing effects).

between what is national and what is local would be diminished, resulting in a centralized government, a concept completely contrary to the Founders' intent.²⁰² Though it is unclear as to what constitutes a traditional state function, the United States Supreme Court has declared that regulation of land use constitutes a "quintessential state activity."²⁰³

Because a number of features describe a wetland, there is no uniform federal definition of a wetland.²⁰⁴ Since the ecological value of a wetland depends on its particular characteristics and its specific location, many argue that states are in a better position than federal agencies to conserve wetlands.²⁰⁵ Furthermore, as the Supreme Court stated, land use regulation constitutes the most essential state activity.²⁰⁶ As a result, the regulation of wetlands is a traditional state function.²⁰⁷

The federal government's justification for protecting wetlands is based on its desire to keep navigable waterways navigable and to control interstate externalities, such as interstate pollution.²⁰⁸ Under this approach, Corps would have to make a case-by-case determination of whether the activity at issue will impact a federal or a state interest.²⁰⁹ The issue of whether a wetland is subject to federal

202. *See id.*; *see also* Adler, *supra* note 1, at 15. In order for federalism to have some meaning and to protect individual liberty, Congress' Commerce power must be limited. *See id.*

203. *See* Adler, *supra* note 1, at 16 (quoting 1982 Supreme Court declaration of importance of state-controlled land use regulation).

204. *See id.* at 23. A universal definition of wetlands is difficult to ascertain because there are numerous and different types of wetlands and because it is nearly impossible to ascertain where a particular wetland ends and where the land begins. *See id.* A uniform definition of wetlands thus runs the risk of becoming either overinclusive or underinclusive. *See id.*

205. *See id.* at 23-24. Generally, what is considered to be wet in one area of the nation, such as the southwest, a more arid region, may be considered dry in another area, such as Louisiana. *See id.* Also, the variations in rainfall in different regions are important to the functions and values of wetlands. *See id.*

206. *See* Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742 (1980) (referencing other state activities that were not as important as land use regulation).

207. *See* Adler, *supra* note 1, at 36 (noting importance of regulating wetlands for a state).

208. *See id.* According to these grounds of federal jurisdiction, it seems as though the federal government's assertion of jurisdiction over isolated wetlands is unjustified, because that regulation does not fall under either ground for jurisdiction. *See id.*

209. *See id.* This means that Corps could stop wetlands development that may disrupt the flow of a navigable waterway, but they could not regulate home construction and other activities that simply involve filling wetlands. *See id.* at 37.

jurisdiction is, however, a legal issue.²¹⁰ An isolated wetland's impact or value, therefore, should be immaterial.²¹¹

Moreover, Corps should not be permitted to make this case-by-case determination because they lack the authority to regulate isolated wetlands.²¹² CWA section 404 does not explicitly discuss the issue of regulating isolated waters, nor does it mention regulation based on the presence of migratory birds.²¹³ Corps, therefore, should not be allowed to utilize the migratory bird rule, because doing so would readjust the state and national authority balance.²¹⁴ The migratory bird rule thus enables Corps to be the final and deciding authority as to whether the filling of isolated wetlands serves the public interest.²¹⁵ This is problematic both because land use planning has traditionally been of local concern and because this rule shifts concern to the federal government.²¹⁶

Some environmentalists claim the SWANCC decision is more of a states' rights decision than an environmental law decision.²¹⁷ The conservative SWANCC Court sought to restore states rights that the federal government usurped.²¹⁸ Following this decision, states still enjoyed the authority to regulate isolated wetlands.²¹⁹

IV. CONCLUSION AND IMPACT OF SWANCC

The Supreme Court's recent federalism decisions signal a refinement of Congress' ability to exercise its Commerce Clause powers in order to regulate private activity as well as state action or local

210. *See id.* (reiterating fact that connection to interstate commerce, not wetlands' value, forms basis for federal jurisdiction).

211. *See id.*

212. *See* Bishop, et al., *supra* note 159, at 10637 (arguing Corps exceeds its authority to regulate interstate Commerce by using migratory bird rule).

213. *See generally* 33 U.S.C. §§ 1251-1387 (1994).

214. *See* Bishop, et al., *supra* note 159, at 10637. Using the migratory bird rule offends federalism. *See id.*

215. *Compare* Bishop, et al., *supra* note 159, at 10637, *and* SWANCC, 531 U.S. 159 (2001). This occurs when, as in SWANCC, state and local authorities approve a project or activity and the project or activity is an important public project that will serve local needs. *See* Bishop, et al., *supra* note 159, at 10637.

216. *See* Bishop, et al., *supra* note 159, at 10637 (asserting migratory "bird rule is an affront to our federalism because" allowing federal government to regulate isolated wetlands places land use planning under control of federal government rather than local concern).

217. Interview with Janet S. Kole, The Law Offices of Janet S. Kole, in Collingswood, N.J. (Feb. 2, 2001).

218. *See id.* (stating Court's intent to limit federal government and to expand states' rights).

219. *See id.* (noting states still enjoy their right to regulate their land).

activity.²²⁰ Many environmentalists believed that the SWANCC case would provide the Supreme Court with the opportunity to resolve its conflicting federalism opinions with the most controversial environmental policy of the last decade, the migratory bird rule.²²¹ The Court, however, rendered a very narrow decision and did not address questions of whether Corps could regulate isolated waters consistent with the Commerce Clause.²²² Most importantly, the Supreme Court did not invalidate the migratory bird rule.²²³ Rather, the Court held that the rule was misapplied to the gravel pits in Chicago.²²⁴

The effect of this decision is that Corps can no longer rely on migratory birds' use of isolated waters as a habitat as the only basis for asserting CWA jurisdiction.²²⁵ SWANCC limits the circumstances under which both Corps and EPA can assert regulatory authority pursuant to CWA.²²⁶ Additionally, the decision limits the CWA's geographical reach.²²⁷

The SWANCC decision not only limits the CWA's reach, but also poses significant environmental problems. Isolated wetlands are essential for sustaining clean and healthy water for the American people.²²⁸ They provide society with countless benefits.²²⁹

220. See Gerhardt, *supra* note 60, at 18 (remarking Supreme Court's recent federalism decisions should not be viewed as attack on environmental protection movements).

221. See *id.* (noting SWANCC Court did not render broad opinion environmentalists expected).

222. See SWANCC, 521 U.S. 159, 163 (2001). The Supreme Court, in SWANCC, if they determined Corps did not have the authority to regulate the gravel pits in question, they did not have to address the Commerce Clause question. See *id.*

223. See *id.* at 174. (recognizing specific application of SWANCC decision).

224. Interview with Janet S. Kole, *supra* note 217. "The migratory bird rule is not null and void; they just misapplied it to this pit." *Id.*

225. See Memorandum from the United States Environmental Protection Agency and United States Department of the Army, to the federal, state and tribal staff of the United States Environmental Protection Agency (January 19, 2001). The memorandum discusses which aspects of the regulatory definition of "waters of the United States" SWANCC affects. See *id.*

226. See *id.* (observing overall effect of SWANCC).

227. See David C. Feola & David R. Fine, *The "New Federalism": Ignore It At Your Peril*, 29 COLO. LAW 5 (2000) (discussing impact of pending Court decisions regarding CWA).

228. See Press Release, United States Environmental Protection Agency, Clinton-Gore Administration Takes Action to Protect the Nation's Wetlands (January 9, 2001) (on file with author) (quoting EPA Administrator Carol M. Browner on importance of wetlands).

229. Dennis J. Priolo, *Section 404 of the Clean Water Act: The Case for Expansion of Federal Jurisdiction Over Isolated Wetlands*, 30 LAND & WATER L. REV. 91, 94 (1995) (discussing numerous benefits of isolated wetlands).

Aside from providing a habitat for migratory birds as well as the Nation's endangered species, isolated wetlands also recharge groundwater and prevent water pollution and nutrient overload.²³⁰ Most importantly, isolated wetlands collect and store water runoffs from adjacent wetlands, acting as a sponge and providing flood control and preventing mudslides.²³¹ Thus, the destruction of isolated wetlands will lead to increased flooding, mudslides, over-development and the inevitable making of disasters.²³²

Constraining the power of the federal government will also lead to less environmental protection.²³³ Granting state governments responsibility for safeguarding the environment will result in problems such as institutional incompetence, while competition among the states will substantially cause the environment to deteriorate.²³⁴

On the positive side, developers will be able to fill in what previously had been considered a wetland, so long as state and local governments approve.²³⁵ Private landowners will also benefit because their private property rights will not be curtailed.²³⁶ Finally, SWANCC preserves local and state land use planning, a territory of the states for a long time.²³⁷

230. *See id.* (pointing out environmental benefits isolated wetlands provide to society).

231. Interview with Janet S. Kole, *supra* note 217. Isolated wetlands are necessary as a sponge. *See id.* Floods and mudslides occur because one takes away the wetland without providing something else to absorb the water runoff in its place. *See id.*

232. *See id.* The state of Arizona has been totally developed and, as a result, there has been an increase in mudslides and washouts because nothing exists to absorb the rain. *See id.*

233. *See* Adler, *supra* note 1, at 42. Although this is the generally held proposition, some have begun to doubt this view recently. *See id.* Some assert that federal environmental policy is no longer able to provide the level of protection that Americans want at a cost that they are willing to accept. *See id.*

234. *See id.* at 42-43. This is known as the "race-to-the-bottom" theory. *See id.* The theory basically contends that states will compete with each other to attract industry by lowering the regulatory burdens on these companies. *See id.* This competition creates pressure on environmental safeguards because companies will search for states with the least regulatory burden. *See id.* Consequently, states attract companies by lowering the economic burden of environmental regulations. *See id.*

235. Interview with Janet S. Kole, *supra* note 217.

236. *See* Priolo, *supra* note 229, at 95. Private landowners argue that federal regulation of isolated wetlands intrudes upon their private property rights resulting in a diminution in property value. *See id.*

237. *See* Adler, *supra* note 1, at 36 (discussing negative impact of federal regulation on state land use control).

Environmentalists believe that Corps will still attempt to regulate these waters.²³⁸ They may try to regulate an inland wetland that serves an important function, such as providing habitat, based on *Riverside* and the rationale that it is part of the watershed that is connected to any navigable waterway.²³⁹ Therefore, since the Supreme Court did not invalidate the migratory bird rule, Corps may redefine "adjacent" to include anything connected to the watershed.²⁴⁰

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238. Interview with Janet S. Kole, *supra* note 217.

239. *See id.*

240. *See id.*